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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD JOHN QUINTANILLA,

Defendant and Appellant.

C058993

(Super. Ct. No. 04F11184)

A jury found defendant Edward John Quintanilla guilty of first degree murder in the commission of a robbery (special circumstance), two counts of first degree robbery, and being a felon in possession of a firearm, for which he received a sentence of life in prison without the possibility of parole, plus one year.

On appeal, defendant contends: (1) the trial court committed prejudicial error in instructing the jury with CALCRIM No. 372 regarding flight; (2) the prosecution engaged in prejudicial misconduct by failing to redact references in an exhibit that defendant was a drug dealer; and (3) the trial

court erred in imposing a parole revocation fine. The People concede defendant's third claim but argue the remaining claims are without merit. We will direct the trial court to strike the parole revocation fine and will affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

On December 9, 2004, defendant and his friend, Deandre Scott, drove over to Danny Hampton's house. Defendant, Scott, and Hampton sat around talking. Hampton brought up the idea of robbing Larry Elliott, Jr., a drug dealer he knew who had a lot of marijuana. They called Camitt Doughton, who came over and joined in the conversation. Hampton told the group there were "pounds and pounds of weed," money, and guns to be had. The four men hatched a plan to get a motel room registered under the name of "some crack head" and call Elliott to the motel room, where they would stage a fake robbery, detaining Elliott there while defendant and Scott went to Elliott's home and stole the marijuana from his garage.

Shortly thereafter, defendant rented a motel room with Scott, then drove home, changed into black clothes, made a ski mask by cutting eye holes out of a beanie, and got his gun and some gloves.

Defendant's girlfriend, Kobra, drove defendant to the motel after dropping Doughton off at the light rail station across the street. Once all four men were at the motel, Hampton called Elliott as planned and said, "'Uh, some guys over here want some weed, a half ounce of weed.'" "'You bring it to me. I'm over here riding at the motel.'" Elliott said he had company and

could not come to the motel, but invited Hampton to come by his house instead. Hampton told Elliott he would call him back and hung up. Hampton suggested an alternate plan. The group would go to Elliott's house and Hampton would go inside the garage and act like he wanted to purchase some marijuana. Instead, he would pull a gun on Elliott while the rest of the group would come in, "get all the stuff out of the garage" and leave. Defendant and the other men agreed. Hampton called Elliott back and said he would come by the house.

Scott and Doughton got into Scott's car and followed defendant's car, driven by Kobra, to a park close to Elliott's house. Once at the park, defendant told Kobra to wait in the car, telling her they would "be right back." Hampton said he and Doughton were "'gonna go in real quick,'" telling defendant and Scott to "'come in like pretty soon right afterwards.'" Hampton and Doughton, both armed with guns, walked from the park to Elliott's house while defendant and Scott waited in the car. Shortly thereafter, Hampton called defendant on his cell phone, telling him, "'Come on.'"

Defendant and Scott walked down the street, pulling their ski masks on as they neared Elliott's house. Defendant's gun was in the pocket of his hooded sweatshirt. When they arrived at Elliott's house, the garage door was wide open. Hampton and Doughton were standing in the garage talking to Elliott and two other men. Defendant and Scott walked into the garage with their masks on. Hampton and Doughton pulled out their guns. Defendant pulled his gun out and said, "'Okay. Everybody get

down then.'" Defendant, Hampton, and Doughton all yelled, "'Get down. Get down. Get down.'" Elliott and the other two men complied. Scott closed the garage door. While Elliott and one of the men were on the floor, defendant and Hampton told the third man to get up and turn on some music. Hampton and defendant asked Elliott where to find the money and marijuana. Hampton handed his gun to Scott, and Scott and Doughton went into the house to look around. Defendant told the other man lying on the floor to take his clothes off so he would not try to escape. Hampton had his foot on Elliott's head and was kicking and stomping him in the head. When Elliott tried to get up, defendant kicked him in the back, telling him to get back down on the floor. Defendant pistol-whipped Elliott three times in the back of the head, causing him to bleed. Elliott said, "'I'm gonna die. I'm gonna die.'" "'I'm gonna bleed to death.'" He also told defendant his girlfriend and child were inside the house.¹ Defendant gave Elliott a shirt to stop the bleeding and assured him his family would not get hurt, telling him to "[j]ust give it up." Elliott told defendant and Hampton the marijuana was in a five-gallon bucket in the garage, but said, "'I don't got no money. I spent it on a truck.'"

Meanwhile, inside the house, Elliott's girlfriend, Heidi Mackelvie, was dozing on the couch in the living room. She

¹ Elliott lived at the home with his girlfriend, Heidi Mackelvie, and their son, Damion, as well as a roommate and her daughter.

awoke to Doughton holding a gun to her head and telling her to get on the floor and not look up. She complied and, as she did, she saw Scott, armed with a gun, enter the house and go into one of the bedrooms. Not knowing what the intruders intended, Mackelvie yelled that her baby was in the bedroom. She could hear that the house was being ransacked. Doughton repeatedly asked her for the keys and the money, and she gave him her purse. Doughton went to the garage door several times and spoke to his cohorts in the garage. He kept asking where the money was and saying, "Someone is gonna get popped." Eventually, when Mackelvie heard the garage door close, she ran out of the house and across the street to called for help.

Doughton came from the house into the garage carrying a dog food bag, which he began filling with toy guns. Scott came out 30 seconds later asking, "'Where the hell is the girl at? She's gone.'" He opened the garage door and ran, as did defendant, thinking the police were probably on their way. Scott and defendant were approximately three houses away when defendant heard a single gunshot. He kept running. He and Scott took their ski masks off and ran to the cars. Defendant got into his car, followed 20 seconds later by Hampton, who threw a five-gallon bucket containing marijuana and the dog food bag full of toy guns into the backseat. Scott got into his own car, followed by Doughton. Defendant said, "We gotta go," and Kobra drove off, with Scott's car following. During the drive home, defendant asked Hampton, "Who capped him?"

Both cars returned to defendant's house, where the four men divided up the marijuana. They did not directly discuss the shooting, but defendant assumed Doughton was the shooter because he had a gun when he got back to the car (and Hampton did not) and Doughton had said earlier that he did not want his face to be seen by Elliott. Defendant said to the others, "'Man, it didn't have to happen like that, man.'" Hampton and Doughton said, "'It did, though. It did.'" Doughton told Hampton, "'I did that for you.'"

Hampton and Doughton left defendant's house sometime between 1:00 and 2:00 a.m., taking with them their share of the marijuana. Scott left shortly thereafter, taking his share of the marijuana.

The next morning, defendant and Scott drove around and visited with Scott's girlfriend. Defendant and Scott discussed the fact that someone was shot and killed during the robbery.

Scott returned to defendant's house the next day and picked up the guns. Defendant read an article about the incident in the newspaper, confirming Elliott had been shot and killed. He called Scott to discuss the news story. Knowing things were "gonna get hot," he then called his father in Oregon to see if it was okay to come out and stay with him.

Several days after the robbery, defendant bought a bus ticket using his brother's name and left for Oregon. Kobra joined him there a few days later. Defendant told her what happened the night of Elliott's murder, and she encouraged him to turn himself in. Within a week of leaving California,

defendant surrendered in Oregon and was returned to Sacramento. In a taped interview, defendant told detectives the details of the crimes.

Defendant was charged with first degree murder (Pen. Code,² § 187, subd. (a) -- count one), two counts of first degree robbery (§ 211 -- counts two and three), and being a felon in possession of a firearm (§ 12021, subd. (a)(1) -- count four). As to count one, the information alleged the special circumstance that the murder was committed during the commission of a robbery within the meaning of section 190.2, subdivision (a)(17) and that he was armed with a firearm during the commission of that offense (§ 12022, subd. (a)(1)). As to count two, it was alleged that defendant committed both robberies in concert (§ 213, subd. (a)(1)(A)) and that principals were armed during commission of those offenses (§ 12022, subd. (a)(1)).

At the conclusion of trial, the jury found defendant guilty on all counts and found all of the special allegations true. The trial court sentenced defendant to life in state prison without the possibility of parole, plus one year.

Defendant filed a timely notice of appeal.

² All further statutory references are to the Penal Code unless otherwise indicated.

DISCUSSION

I

CALCRIM No. 372

Defendant contends instructing the jury in accordance with the flight instruction (CALCRIM No. 372)³ denied him his right to a fair trial because, in doing so, the jury could have found he "had a consciousness of guilt of a murder, when his flight could well have been entirely accounted for by a consciousness of guilt of a lesser offense." Although defendant admitted he fled because he thought the police were on their way, he argues that, because the only crime committed at the time he fled was robbery, he could only have had a consciousness of guilt of robbery, not murder. Thus, he urges that the jury should have been instructed so as to limit any consciousness of guilt finding to the robbery. His argument is misguided.

In order to prove special-circumstances murder based on murder committed in the course of robbery against an aider and abettor who is not the actual killer, the prosecution must show that the aider and abettor had intent to kill or acted with reckless indifference to human life while acting as a major

³ CALCRIM No. 372 provides: "If the defendant fled [or tried to flee] (immediately after the crime was committed or after (he/she) was accused of committing the crime), that conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the defendant fled [or tried to flee], it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled [or tried to flee] cannot prove guilt by itself."

participant in the underlying felony. (§ 190.2, subds. (c), (d).)

Here, the evidence shows defendant acted as a major participant in the robbery of Elliott: he helped plan the robbery; brought his gun; had his girlfriend drive one of the cars; brought and wore a mask to hide his identity; held Elliott and the other victims in the garage; kicked Elliott and pistol-whipped him; and demanded that Elliott give up the money and the drugs.

The evidence also shows that, while participating in the robbery, defendant acted with reckless indifference to human life. The term "reckless indifference to human life" means "subjective awareness of the grave risk to human life created by his or her participation in the underlying felony." (*People v. Estrada* (1995) 11 Cal.4th 568, 578.) While defendant did not pull the trigger on the gun that killed Elliott, he pistol-whipped Elliott in the head, causing him to bleed and fear for his life. He watched as Hampton kicked and stomped Elliott in the head. He was armed, and knew some of his coconspirators were armed as well, one of whom (Doughton) had made clear prior to the crime that he did not want to be identified by the victim, thus raising the possibility that Elliott or one of the other victims might be shot in an attempt to avoid detection.

There is sufficient evidence to support defendant's conviction for robbery. For purposes of special-circumstance murder, guilt of robbery is tantamount to guilt of murder committed during commission of that robbery. Defendant acted as

a major participant in the underlying robbery and acted with reckless indifference to human life while doing so. His flight from the robbery is evidence of his consciousness of guilt of the robbery during the commission of which a murder was committed.

We also note defendant's statement that, when he read the newspaper article confirming Elliott had indeed been shot and killed, he knew things were "gonna get hot" and fled to Oregon. Indeed, the jury could have found this second flight to be evidence of defendant's consciousness of guilt of the murder itself.

In any event, in addition to defendant's consciousness of guilt of the robbery, there was an abundance of evidence upon which the jury could have relied to find the elements necessary to prove special-circumstance murder. Hampton and Doughton were in the garage when Scott came in and warned that "the girl" was gone. As defendant and Scott fled, Doughton and Hampton, one or both of whom were armed, remained in the garage and exercised control over Elliott, the primary victim of the robbery. Neither Doughton nor Hampton had concealed their identity from Elliott or the other victims, and Doughton had expressed earlier that he did not want Elliott to be able to identify him. Elliott was shot and killed as defendant and Scott were in flight. Within 20 seconds of defendant and Scott reaching their cars, Hampton and Doughton arrived bearing the fruits of the robbery. Both cars carrying all four men left and drove to defendant's house, where they divided up the take. That

defendant was not present when Elliott was killed is of no consequence.

Defendant also claims CALCRIM No. 372 violated his right to due process by allowing the jury to draw an impermissible inference of his guilt as to the murder charge. Similar claims have been rejected (*People v. Hernández Ríos* (2007) 151 Cal.App.4th 1154, 1157-1159), as have claims regarding the flight instruction in CALJIC No. 2.52 (*People v. Mendoza* (2000) 24 Cal.4th 130, 179-181; see also *People v. Navarette* (2003) 30 Cal.4th 458, 502).

II

Prosecutorial Misconduct

Defendant claims the prosecution's failure to redact a portion of the transcript (exhibit 131) referring to defendant's drug dealing amounted to prejudicial misconduct. We disagree.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."" (*People v. Navarette, supra*, 30 Cal.4th at p. 506, quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

"A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.'" (*People v. Wharton* (1991) 53 Cal.3d 522, 565, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 854.)

Defendant requested, and the prosecution agreed, to redact from his interview with police any reference to defendant being on parole, in a gang, or involved in selling drugs. The motion to exclude all such references was granted by the court. Pursuant to the court's instruction, both parties reviewed the transcript of the interview to find any reference to gangs.

The videotape of the defendant's interview was shown to the jury, and a transcript of the interview was provided to them as well. At a point early on in the interview, the following colloquy took place between defendant and the detective interviewing him:

"DET. BAYLESS: What were you guys doing?

"[DEFENDANT]: Chilling, rolling around.

"DET. BAYLESS: Rolling around?

"[DEFENDANT]: Gonna make some money, yeah.

"DET. BAYLESS: How would you be trying to make money?

"[DEFENDANT]: Well, you know what I mean? I'm pretty sure people already told you guys. I know they told you already what --

"DET. BAYLESS: Whatever.

"[DEFENDANT]: You know what I'm saying? I was selling a little drugs or whatever.

"DET. BAYLESS: What kind of drugs do you sell?

"[DEFENDANT]: Crank.

"DET. BAYLESS: Okay. What else do you sell?

"[DEFENDANT]: That's it.

"DET. BAYLESS: You don't sell weed?

"[DEFENDANT]: No."

Based on reference in the transcript to the sale of crank, defendant moved for a mistrial. The prosecution claimed the failure to redact that reference was "an oversight," assuring the court he would not make reference to it. The court found that, although the statement was prejudicial, it was not incurable and, over defendant's objection, admonished the jury as follows: "The defendant indicated during this interview that he was selling a little drugs or whatever. That fact, if believed, is not relevant to these proceedings. [¶] As such, it is ordered stricken. You must completely disregard that statement. It cannot be considered for any purpose. Treat it as though you had never heard it."

At the outset, we address defendant's contention that the prosecutor's failure to redact the statement about defendant's drug dealing was "misconduct." To be sure, it was an error to allow the jury to hear this evidence. However, it did not rise to the level of "misconduct" as that term is understood in the law. The prosecutor's one-time failure did not involve a ""pattern of conduct"" so ""egregious"" nor did it

involve ""the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."" (People v. Navarette, supra, 30 Cal.4th at p. 506.)

The real question then is whether the court erred in denying the motion for mistrial and simply instructing the jury to disregard the evidence of defendant's drug dealing. (People v. Rodriguez (1994) 8 Cal.4th 1060, 1154-1155.) It did not. To begin with, there was substantial evidence in the record the prosecutor did not act in bad faith in allowing the evidence of defendant's drug dealing to go before the jury. It was simply an oversight. More importantly, the court was correct that defendant was not incurably prejudiced by the erroneous admission of the evidence. As the court pointed out, defendant was charged with robbery and special-circumstance murder involving marijuana, not crank. And the matter was addressed immediately by jury admonishment, prior to completion of the tape. "A jury is presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith. [Citations.] It is only in the exceptional case that "the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions." [Citation.]' (People v. Olivencia (1988) 204 Cal.App.3d 1391, 1404, quoting People v. Allen (1978) 77 Cal.App.3d 924, 934-935.) This is not an exceptional case. The court therefore did not abuse its discretion in denying defendant's motion for mistrial.

III

Parole Revocation Fine

Defendant contends, and the People properly concede, that the court erred when it imposed a \$200 parole revocation fine in conjunction with the life sentence without the possibility of parole. The trial court is directed to strike the parole revocation fine and prepare an amended abstract of judgment to reflect that modification.

DISPOSITION

The trial court is directed to strike the parole revocation fine imposed pursuant to Penal Code section 1202.45, amend the abstract of judgment, and forward the amended abstract to the Department of Corrections and Rehabilitation. The judgment, as modified, is affirmed.

ROBIE, J.

We concur:

RAYE, Acting P. J.

HULL, J.